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IN THE

Supreme Court of the United States

OCTOBER TERM A. D. 1965

No.....

EDWARD J. KRYSTOFORSKI,
Petitioner,
vs.
THE UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Edward J. Krystoforski, prays that a writ of certiorari be issued to review the judgment of the United States Circuit Court of Appeals, Sixth Circuit, entered on May 13, 1965 and the denial of motion for rehearing and remand entered on June 19, 1965.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals has not yet been reported. It is included in the certified record and reproduced in Appendix A, page 11 of this petition. The motion for rehearing and to remand was denied June 19, 1965 and denial order is included in the Appendix A, page 11. Motion to stay mandate pending application for certiorari was denied on June 24, 1965 without opinion.

JURISDICTION OF THE COURT

Jurisdiction of this Court is invoked under 28 U. S. Code 1254(1); 28 U. S. Code 1651(a); 28 U. S. Code 2106; Rule #19(1)(b) of Supreme Court Rules, and Rule #52(b) Federfal Rules of Criminal Procedure.

QUESTIONS PRESENTED

Whether petitioner was deprived of his substantial and constitutional rights and a fair trial, by:

a. The admission of evidence to the jury of guilty pleas by three-co-defendants.

b. The failure to disclose to the jury of a voluntary dismissal of the indictment as to another co-defendant, but yet continued reference to his participation and overt acts in the alleged conspiracy.

c. Intermingling of evidence of two separate conspiracies in a trial concerning one alleged conspiracy.

d. The trial court reading the indictment to the jury in toto at the outset and substantially in toto in the charge.

STATUTES AND RULES INVOLVED

The following statutory provisions and Court Rules are set forth in Appendix B, pages 12 to 13:

18 U. S. Code 371 and 473; 28 U. S. Code, 1254(1), 1651(a) and 2106; Supreme Court Rule #19(1)(b); and

Rule #52(b) Federal Rules of Criminal Procedure.

STATEMENT

Petitioner and co-defendants Weikert, Wolke and Slavens were arrested November 30, 1961 on a complaint charging a conspiracy to *sell* counterfeit money. At the same time co-defendants Spaulding and Gillard were arrested on a complaint charging conspiracy to *purchase* counterfeit money. On December 8, 1961 all six persons were together indicted for conspiracy to "buy, sell, transfer and receive" counterfeit money. On the arraignment all stood mute or pleaded not guilty.

On January 16, 1963 co-defendants Slavens and Weikert pleaded guilty. On September 24, 1963 the U.S. Attorney moved to dismiss the indictment as to Gillard. The trial started September 24, 1963 and shortly thereafter Spaulding pleaded guilty, leaving only petitioner and co-defendant Wolke to stand trial.

The District Court calendar entries from September 24, 1963 are reproduced in Appendix C, pages 15 to 17 hereof. They disclose the date and sentences of the co-defendants to be:

Gillard—Dismissed September 24, 1963.

Spaulding—Two years, suspended and placed on probation on January 6, 1964.

Weikert—Two years, suspended and placed on probation on February 3, 1964.

Slavens—Two years, suspended and placed on probation on February 3, 1964.

Wolke—Four years on January 20, 1964.

Krystoforski—Three years, six months on January 6, 1964.

The official trial transcript shows no reference to dismissal of the indictment as to Gillard. The official trial transcript by excerpt in Appendix C, page 18, shows the reference to Spaulding's change of plea by the Court; Appendix C, page 18, show testimony of Slavens as to guilty pleas of co-defendants Slavens and Weikert; and page 19 shows the one sentence in the Court's charge with reference to pleas of guilty by other defendants. No reference or explanation was made by the Court as to co-defendant Gillard's absence from the case although the testimony continually refers to Gillard and Spaulding and the overt acts they are charged with.

The trial court read the indictment in toto to the jury and then paraphrased it and the seven overt acts alleged therein in his charge. (Joint Appendix p. 63a and 64a and Appendix C, pages 19-20.) Two of the overt acts refer solely to Spaulding and Gillard. Petitioner was referred to in two other overt acts.

The jury found petitioner and co-defendant Wolke guilty of the conspiracy alleged. Appeal was taken to the Circuit

Court of Appeals, Sixth Circuit, which confirmed on May 13, 1965.

Subsequent to May 13, 1965, petitioner engaged new and present counsel who applied for rehearing and remand which the Court denied on June 19, 1965. It also denied a motion to stay the mandate, on June 24, 1965. Petitioner has surrenedered to the U. S. Marshal and is in custody now.

EXPLANATORY STATEMENT

Petitioner must fairly and candidly admit he was represented by an attorney of his choice in both the District Court and Circuit Court of Appeals. His attorney raised but one issue on that appeal with reference to denial of a single request to charge.

The questions and issues now propounded herein are the product of new counsel who raised them first in the motion for rehearing which was summarily denied. It can possibly be claimed that this action is now the product of hindsight and delayed objectivity.

The issue funnels down to whether petitioner was denied a fair trial under the circumstances and whether this Court will say he must have that fair trial notwithstanding the lack of diligence on the part of his counsel or the trial court. He, not they, must suffer if his rights were denied.

REASONS FOR GRANTING WRIT

I.

This Court, to our knowledge, has never directly ruled on the question of admission of evidence before a jury of pleas of guilt by co-defendants and co-conspirators. It is time for the Court to set forth some rules and guide lines for the bench and bar in this area of trial conduct. Fair trial to co-defendants requires it. Justice is denied to many by the unfair use of such information and to leave it to the discretion of the trial judge is not practicable and results in a practice wholly dependent on the personal whim of the trial judge. This Court long ago decided in *Kercheval v. United States*, 274 U.S. 220, 71 L. Ed. 1009, Sup. Ct. 582; that it was error to admit a plea of guilt (which had been previously withdrawn) on the trial of a subsequent plea of not guilty. Certainly it is just as prejudicial for a jury to learn of the guilty pleas of co-defendants.

The Fifth Circuit Court of Appeals has held it to be error for another of three co-defendants, who was a witness for the government, to testify he had pleaded guilty to all counts of the indictment in *Babb v. United States*, 218 Fed. (2d) 538. The same court earlier held it error to admit in evidence a judgment of conviction of another defendant in the case of *Leroy v. Government of the Canal Zone*, 81 Fed. (2d) 914.

Any former prosecutor or U. S. Attorney knows that to have the jury learn that co-defendants have pleaded guilty is an invaluable aid to securing conviction of those defendants who have temerity to stand trial. Petitioner's case is a good illustration. Six defendants are charged with conspiracy. The jury learns that Spaulding has

pleaded guilty at the outset. The testimony discloses that two others have previously pleaded guilty, Slavens and Weikert. No explanation is offered as to defendant Gillard or his absence from the trial, although reference to him is continuous throughout the trial and his arrest is shown. No jury can be immune to the influence of such evidence. We think that *United States v. Toner,* 173 Fed. (2d) 140, presents a sensible and proper rule to insure a defendant of a fair trial and his right to stand or fall with the proof of the charge made *against him and not against somebody else.* To do otherwise permits a defendant's conviction on hearsay and evidence introduced without the opportunity to cross examine or distinguish. No defendant must be put to the test of cross examining co-defendants who for reasons of their own pleaded guilty. To do so would be fatal and be introducing testimony against one's self.

II.

The second reason is that the trial evidence shows petitioner to have insignificant participation in the alleged conspiracy and mere knowledge and acquiescence without cooperation or agreement. Two conspiracies are referred to in the proofs and are set forth in the basic complaints and warrants. Proofs show that the conspiracy in which petitioner was alleged to participate was for Slavens to *sell* $3,000 of counterfeit to the Secret Service under cover agent. The other conspiracy was that of Spaulding and Gillard to *purchase* an *additional* $2,000 of counterfeit from Slavens. The testimony was that only $5,000 lots of counterfeit were handled by the Canadian sources, and Spaulding and Gillard were taking the "additional" $2,000 to complete the transactions. Of the overt acts alleged, #1 and #2 refer to Spaulding and Gillard *only.* In none of the other five overt acts alleged are they mentioned. In the complaints and warrants there are two conspiracies referred to. We think that the rule in *Kotteakus v. United*

States, 328 U.S. 750, 66 S. Ct. 1239, 79 L. Ed. 1314, was not followed by the prosecution, or the trial court, and was ignored by the Circuit Court of Appeals, in safeguarding each individual "*from loss of identity in the mass.*" Here, we claim, was clearly a case of imputation of guilt from the conduct of others. A review of the entire trial transcript discloses the transaction to be one fomented by the Secret Service Agent, and his informant, and conducted with Slavens the salesman. Petitioner's participation as a mere "tag along" discloses more gullibility than anything else.

III.

The third reason is that the trial court read the indictment *in toto* at the inception of the case. True, he later charged the jury that an indictment was not proof. He also fully paraphrased the indictment and the seven overt acts in his charge to the jury. This is a practice which has been frowned upon by our own Sixth Circuit Court of Appeals in *Norman v. United States,* 100 Fed. (2d) 905 wherein it said the practice of reading the indictment to the jury *is not commended.* It did not reverse on that ground, however. It is generally termed to be harmless error and cured by references in the charge. Here, we think it was a substantial error and resulted in depriving petitioner of substantial justice and a fair trial because:

a. It emphasized participation by persons who had pleaded guilty.

b. It emphasized the name of co-defendant Gillard who was not on trial and whose absence or dismissal was never explained.

c. It gave the jury an unfounded basis for assuming, that four of six co-conspirators having pleaded guilty, the remaining two *must* be guilty.

CONCLUSION

To protect petitioner's right to a fair trial and to guide the District Courts in their conduct of trials wherein co-defendants have pleaded guilty; and to assure defendants of substantial justice regardless of degree of guilt or participation in the alleged crime; the petition for writ of certiorari should be granted. Petitioner's substantial rights have been affected by these *"plain"* errors.

Respectfully submitted,

GEORGE F. MEHLING,
Counsel,
and
ORRIN C. JONES,
Attorneys for Petitioner,
1466 Penobscot Building,
Detroit 26, Michigan.

APPENDIX A

OPINION OF CIRCUIT COURT OF APPEALS

Decided May 13, 1965

Before WEICK, Chief Judge, CECIL and PHILLIPS, Circuit Judges.

PER CURIAM. Appellant was convicted by a jury in the District Court on a charge of conspiracy to violate the counterfeiting statute, 18 U.S.C. 371, 473. In his appeal Appellant presented only one point, namely, error of the Court in refusing to give to the jury Appellant's Special Request to Charge No. 2. The substance of this request was covered in the Court's general charge to the jury, although not in the language requested. We are of the opinion that the Court's charge was sufficient.

Judgment affirmed.

ORDER DENYING REHEARING

(Filed June 19, 1965)

Before WEICK, Chief Judge, CECIL and PHILLIPS, Circuit Judges.

The petition for rehearing presents points which Appellant admits "were not previously brought to the attention of this Court or the trial judge". We are therefore not required to consider them. Rule 51 F.R. Crim. P.; *Robin-*

son v. United States, 327 F. 2d 618 (C.A. 8, 1964); *Gajewski v. United States,* 321 F. 2d 261 (C.A. 8, 1963).

The petition for rehearing is denied.

Entered by order of the Court.

DENIAL OF STAY OF MANDATE

Letter Dated June 24, 1965

Re: United States of America v. Edward J. Krystoforski—No. 16,092

Gentlemen:

Please be advised that the Court has today denied the motion of Defendant-Appellant for a stay of the mandate in the above case.

Yours very truly,

/s/ Carl W. Reuss, Clerk

APPENDIX B

18 U. S. CODE, SECTION 371

Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

18 U. S. CODE, SECTION 473

Dealing in counterfeit obligations or securities

Whoever buys, sells, exchanges, transfers, receives, or delivers any false, forged, counterfeited, or altered obligation or other security of the United States, with the intent that the same be passed, published, or used as true and genuine, shall be fined not more than $5,000 or imprisoned not more than ten years or both. June 25, 1948, c. 645, 62 Stat. 705.

28 U. S. CODE, SECTION 1254(1)

Courts of Appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

28 U. S. CODE, SECTION 1651(a)

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

28 U. S. CODE, SECTION 2106

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, ord order, or require such further proceedings to be had as may be just under the circumstances June 25, 1948, c. 646, 62 Stat. 963.

SUPREME COURT RULE 19(1)(b)

1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered;

(a) (Omitted.)

(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

RULE 52, FEDERAL RULES OF CRIMINAL PROCEDURE

Harmless Error and Plain Error

(a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) Plain Error. Plain errors or defects affecting substantial rights maye be noticed although they were not brought to the attention of the court.

APPENDIX C

CALENDAR ENTRIES, CRIMINAL DOCKET No. 39099 FROM SEPTEMBER 24, 1963 TO JUNE 30, 1965

1963

Sept. 24. Motion and order dismissing indictment and cancelling bond of defendant Gillard, filed and entered; Kaess, J.

Sept. 24. Jury trial begins; defendant Spaulding pleads guilty; Ref. bond continued; trial adjourned to Sept. 25/63; Kaess, J.

Sept. 24. Jury record filed; Kaess, J.

Sept. 25. Jury trial resumed; adjourned to Sept. 26/63; Kaess, J.

Sept. 26. Jury trial resumed; verdict, guilty as to both defendants; Ref. bond of each $1,000.00; Rem. Kaess, J.

Sept. 26. Bond of defendant Krystoforski, in $1,000.00 filed—Stuyvesant Ins. Co., surety.

Sept. 26. Bond of defendant Wolke, in $1,000.00 filed—Stuyvesant Ins. Co., surety.

Oct. 24. Transcript of September 24/63 filed.

Oct. 31. Substitution of attorneys for defendant Wolke, filed.

Nov. 13. Subpoenas filed.

1964

Jan. 6. Defendant Spaulding committed to custody of Attorney General for a period of two (2) years, suspended and placed on probation for two (2) years; bond cancelled; Kaess, J.

Jan. 6. Defendant Krystoforski, committed to custody of Attorney General for a period of three (3) years and six (6) months, under provisions of Sec. 4208(a)(2), T. 18, USC. Bond continued pending appeal; Kaess, J.

Jan. 6. Appeal of defendant Krystoforski, filed.

Jan. 6. Proof of mailing filed.

Jan. 20. Defendant Wolke, represented by counsel, committed to custody of Attorney General under provisions of Sec. 4208(a)(2), T. 18, USC, for a period of four (4) years; bond continued pending appeal; Kaess, J.

Jan. 21. Notice of appeal of defendant Wolke filed.

Jan. 23. Proof of service.

Feb. 3. Defendant James L. Weikert, sentenced to imprisonment for two (2) years, suspended and placed on probation for two (2) years; bond cancelled; Kaess, J.

Feb. 3. Defendant Richard Slavens, sentenced to two (2) years, suspended and placed on probation for two (2) years; bond cancelled; Kaess, J.

Feb. 11. Stipulation and order to extend time to docket appeal to May 6, 1964 for defendant Krystoforski, entered and filed; Kaess, J.

Feb. 17. Petition and order to extend time to docket appeal to April 28/64 for defendant Wolke, entered and filed; Kaess, J.

Apr. 14. Stipulation and order extending time for defendant Wolke to docket appeal to May 6, 1964, filed and entered; Kaess, J.

Apr. 14. Petition of defendant Wolke for extension of time to file record on appeal, etc., filed—hearing April 27/64.

Apr. 27. Petition for extension of time to file record on appeal heard and granted; Kaess, J.

Apr. 27. Order extending time to file record on appeal to July 15/64 filed and entered; Kaess, J.

July 10. Stipulation and order extending time to docket to Aug. 24/64 filed and entered, for defendant Krystoforski; Kaess, J.

July 14. Stipulation and order extending time to docket appeal (for defendant Wolke) to Aug. 24/64, filed and entered; Kaess, J.

Aug. 3. Petition and order for writ of habeas corpus, filed and entered; writ issued; Kaess, J.

Aug. 4. Transcript of September 24/63 filed.

Aug. 4. Order cancelling bond of defendant Wolke and dismissing his appeal and sentence imposed Jan. 20/64, for a term of four (4) years, under provisions of Sec. 4208(a)(2), T. 18, USC, shall commence as on this date, and sentence to run concurrently with sentence imposed on July 31/64 by state, filed and entered; Kaess, J.

Aug. 4. Amended judgment and commitment of defendant Wolke filed.

Aug. 12. File mailed to C.A.

Aug. 20. Acknowledgment filed.

1965

May 26. Report and order terminating probation prior to original expiration date as to Franklin Delano Spaulding filed and entered; Kaess, J.

June 30. Mandate of C.C.A., as to Edward J. Krystoforski, filed.

EXCERPT FROM TRIAL TRANSCRIPT—Page 25

Tuesday, September 24, 1963

(Whereupon, the trial of the above-entitled cause was resumed pursuant to the noon recess.)

The Court: The lateness in which you are returning is two-fold, I was late in returning from our Judges' meeting. Subsequent to that time you will notice a little difference in the defendants' table, and I must advise you that one of the defendants, Mr. Frank Spaulding, has changed his plea from not guilty to guilty, and the Court has had to take care of that situation.

And you may proceed now.

EXCERPTS FROM TRIAL TRANSCRIPT OF TESTIMONY OF DEFENDANT SLAVENS, ON PAGES 193 AND 220

Q. (By Mr. Rosenthal): Mr. Slavens, you stated that you had pleaded guilty to this conspiracy that is being tried today, can you tell me, sir, if you know the disposition of Mr. Weikert to this conspiracy?

A. He pleaded guilty at the same time I did.

* * * * *

Q. Mr. Slavens, you are awaiting sentence in fact by the Honorable Judge Kaess, are you not?

A. Yes, sir.

Q. Have you been told that by testifying you would receive any consideration, sir?

A. No, sir.

Q. Have you been made any promises by my office?

A. No, sir.

EXCERPTS FROM CHARGE OF COURT

(Page 61a, Joint Appendix)

Similarly, the fact that one or more of the defendants as here may have pled guilty to the charge, that fact alone should not give rise to an inference of guilt as to the remaining defendants.

(Pages 63a and 64a, Joint Appendix)

It is charged in the indictment, and although I have read it to you at the outset, I am going to paraphrase it again, so it is well in mind.

That on or about November 30, 1961, in this district, Edward J. Krystoforski, James Lloyd Weikert, John C. Wolke, Richard Slavens, Franklin Delano Spaulding, and Burton Willie Gillard, the defendants herein, did lawfully, wilfully, knowingly and feloniously conspire, combine, confederate and agree together, each with the other, and diverse other persons whose names are to your Grand Jurors unknown, in violation of the law, to commit an offense against the United States of America and the laws therein, to-wit: to unlawfully and knowingly buy, sell, transfer and receive counterfeit (p. 64a) obligations of the United States of America, with the intent that the same be passed, published and used as true and genuine, in violation of the law.

And that the Grand Jury further charges that during the (237) existence of the said conspiracy, the defendants herein did the following overt acts in furtherance of this conspiracy to effect the purposes of said conspiracy.

1. That on or about November 30, 1961, in this district Franklin Spaulding and Burton Gillard entered the Patio Show Bar, 14650 West Eight Mile Road, Detroit;

2. That on or about November 30, 1961, Franklin Spaulding and Burton Gillard traveled from the Patio Show Bar to Housey's Chop House, 503 East Jefferson, Detroit;

3. That on or about November 30, 1961, James Weikert entered the Patio Show Bar;

4. That on or about November 30, 1961, James Weikert traveled from the Patio Show Bar to Housey's Chop House;

5. That on or about November 30, 1961, John Wolke, Richard Slavens, Edward Krystoforski entered the Patio Show Bar;

6. That on or about November 30th, John C. Wolke, Richard Slavens and Edward Krystoforski traveled from the Patio Show Bar to Housey's Chop House;

7. That on or about November 30th, 1961, Richard Slavens had in his possession and showed an Agent of the United States Secret Service a $100 counterfeit obligation of the United States of (238) America.

* * * * *